

A.C. 40978

**LYME LAND CONSERVATION
TRUST, INC.**

v.

BEVERLY PLATNER

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APPELLATE COURT

STATE OF CONNECTICUT

DECEMBER 11, 2017

PLAINTIFF'S MOTION FOR TRANSFER TO THE SUPREME COURT

In accordance with Practice Book § 65-2, the plaintiff, Lyme Land Conservation Trust, Inc., moves that the above captioned matter be transferred from the Appellate Court docket to the Supreme Court docket for the reasons set forth herein.

1. Brief History

On a prior appeal from the trial court (Koletsky, J.T.R.), the Supreme court found that the trial court properly interpreted a conservation restriction ("Declaration") held by the plaintiff in multiple respects. The Supreme Court held that "[t]he restoration plan ordered by the court was authorized by the declaration as well as by General Statutes §§ 47-42c and 52-560a, and was predicated on factual findings having adequate evidentiary support." Lyme Land Conservation Trust, Inc. v. Platner, 325 Conn. 737, 752 (2017) ("Lyme Land I"). The court issued a narrow remand directing the trial court to hold further proceedings for a "recalculation of attorney's fees and damages." Thereafter, the defendant filed a Motion for Reconsideration with the Supreme Court regarding the Restoration Plan and the Motion was denied.

At the remand hearing, the trial court denied the defendant's Motion for Disqualification, Motion to Open the Judgment, a motion defendant labeled "Motion to Allow Evidence and Argument Regarding Assessment of Damages Pursuant to Conn.

Gen. Stat. 52-560a" ("Motion to Allow Evidence"), and the Motion for Stay of the Restoration Order.

Thereafter, the defendant appealed again to the Appellate Court and filed Motions for Review of both the denial of the Motion for Articulation of the Motion to Disqualify and the denial of the Motion for Stay of the Restoration Order.

2. Specific Facts

Before a hearing on the remand was scheduled, the defendant moved to disqualify Judge Koletsky under C.G.S. Section 51-183(c) and Practice Book Section 1-22 and 1-23. The plaintiff opposed the Motion to Disqualify and the defendant's motion was denied. Defendant then filed a Motion to Open the Judgment. In her Motion to Open the defendant claimed the meadow subject to the Restoration Order had restored itself due to the passage of time and the planting of plugs and removing of certain shrubs ordered by the trial court would harm the environment. The defendant further questioned the role of the inland wetlands agency of the Town of Lyme in reviewing any new work performed on the property.

The plaintiff filed a memorandum of law in opposition to the defendant's motion to open the judgment claiming that the defendant advanced no good and compelling reason to overcome the principle that, once rendered and upheld by the Supreme Court, a judgment is final. The plaintiff's opposition asserted that the issues the defendant sought to relitigate were issues upon which evidence had previously been heard by the trial court. Indeed, in her Motion to Open the defendant raised two of three grounds already advanced in her Motion for Reconsideration before the Supreme Court namely that the Supreme Court "permit" the trial court to open the judgment to consider

changes in the filed since the trial court's judgment in 2015 and to eliminate the requirement that exotic and ornamental planting beds be removed from the field.

A hearing on the defendant's Motion to Open was held on October 3. The trial court refused to take evidence but it permitted an offer of proof. The trial court denied the defendant's Motion to Open the Judgment on October 6, 2016. Later on October 3 the defendant filed a Motion to Allow Evidence, which was also denied.

A hearing was held before the trial court on the Supreme Court's remand order on October 6 wherein the plaintiff's expert testified regarding the cost of the Restoration Order. The defendant did not put on any evidence of the cost of the Restoration Order nor did she cross-examine the expert regarding the cost.

After finding the cost of the Restoration Order was \$242,244, the Court re-entered judgment for damages of \$350,000 and denied the defendant's motion "without prejudice to renew". It also denied in writing the defendant's Motion for Reargument.

On October 23, the defendant filed the present appeal raising, among other things, the alleged error in the denial of the Motion for Disqualification, the Motion to Open, and the Motion to Allow Evidence. Thereafter, the defendant filed a Motion for Stay claiming again that the passage of time had restored the meadow and the mandatory relief ordered by the trial court and upheld by the Supreme Court would cause environmental harm.

The plaintiff filed an Objection to defendant's Motion for Stay. In its Objection the plaintiff claimed (1) that the Supreme Court has affirmed the propriety of the Restoration Order; (2) it is unlikely the defendant will prevail on her appeal from the trial court's denial of her Motions to Open Judgment or her Motion to Allow Evidence and

thereafter obtain a further order of the trial court altering the Restoration Order; (3) pursuant to C.G.S. Section 52-477 this Court cannot grant the motion to stay because it is made for the sole purpose of delay without further good faith basis; and (4) if the Court reaches a balancing of the equities test from Griffin Hospital v. Commission of Hospitals and Health Care, 196 Conn. 451 (1985), on which the defendant's entire argument rests, it is submitted that the balancing of the equities as set out in Griffin Hospital do not apply.

3. Legal Grounds

Practice Book § 65-2 provides in relevant part that "[a]fter the filing of an appeal in the appellate court, but in no event after the case has been assigned for hearing, any party may move for transfer to the Supreme Court. The motion, addressed to the supreme court, shall specify . . . the reasons why the party believes that the supreme court should hear the appeal directly." The plaintiff submits that the Supreme Court should hear this appeal directly for several reasons: (1) this appeal arises from proceedings held pursuant to a remand order from the Supreme Court and will require the Court to interpret that remand order; (2) judicial economy weighs in favor of the Supreme Court hearing this appeal directly because the history of this action over the past nearly decade suggests that no matter the outcome at the Appellate Court, further review will be sought at the Supreme Court; and (3) this appeal involves a question related to but distinguishable from the disqualification issues the Supreme Court is currently considering in Barlow v. Commissioner of Corrections, SC 19774.

A. This appeal arises from proceedings held pursuant to a remand order from the Supreme Court and will require the Court to interpret that remand order.

At the remand hearing before the trial court, the court took testimony regarding the cost of the Restoration Order upheld by the Supreme Court. Upon appealing from these limited proceedings the defendant moved to stay the mandatory injunctive relief that the property be restored pursuant to the Restoration Order by the trial court and upheld by the Supreme Court.

This Motion to Transfer is being filed early pursuant to the author's comments in Connecticut Practice Series, Rules of Appellate Procedure, 2016-2017 Edition, Wesley Harton and Kenneth J. Bartschi, which states, "In Cashman v. Cashman, S.C. 15629, a motion to transfer was filed early and granted so the Supreme Court could rule on a pending motion for review of a stay order." The issues raised by the defendant's motion for review of the trial court's denial of the stay are the exact same issues which were raised before the trial court and then again in the defendant's appeal to the Supreme Court, and the Supreme Court is in the best position to decide if the defendant's claims are warranted.

B. Judicial economy weighs in favor of the Supreme Court hearing this appeal directly.

The Supreme Court issued its decision in the defendant's appeal on May 23, 2017. This case is less than one year old and the Supreme Court is in the best position to assess the issues on appeal. The defendant alleged and her expert testified in August of 2015 before the trial court that the meadow had restored itself so that no restoration plan was needed. The trial judge rejected the defendant's assertion and mandated the defendant to comply with the planting plan submitted by the plaintiff's experts and the Supreme Court unanimously affirmed the trial court's ruling. Thereafter, on June 2, the plaintiff filed a Motion for Reconsideration with the Supreme Court

claiming first that the restoration plan adopted by the trial court conflicts with the Supreme Court's opinion regarding "the cultivation of flowers and the planting of plugs" and second, that the "field" had changed in the intervening time and the Supreme Court should permit the trial court to modify the restoration plan as appropriate. On June 28, 2017, the Supreme Court denied the defendant's motion. Now, just five months later, the Appellate Court is again being asked to revisit the issues that the Supreme Court has already decided.

C. The defendant's appeal involves a question related to but distinguishable from issues the Supreme Court is currently considering in Barlow v. Commissioner of Corrections, S.C. 19774.

The Supreme Court is in the best position to decide the disqualification issues presented by both the plaintiff and defendant in the defendant's second appeal in light of the case currently before it captioned Barlow v. Commissioner of Corrections, S.C. 19774. The defendant's Motion to Disqualify the trial judge involved an interpretation of C.G.S. § 51-183c and its counterpart P.B. § 1-22(a) which provides "No judge of any Court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case..."

In Barlow, the Appellate Court had reversed the habeas court's conclusion that the petitioner's trial counsel was not deficient and remanded for further proceedings to determine whether the petition was prejudiced by the deficient performance of counsel, a question the habeas court had not decided. The same judge heard the matter on remand, denying the petitioner's motion for recusal based on § 51-183c and P.B. § 1-22(a). The habeas court held that it had not been reversed on the issue to be

determined on remand and no new evidence was required to resolve the claim. The Appellate Court reversed and the issue is before the Supreme Court.

The issues before the Supreme Court in Barlow focused on the meaning of “reversed” because the trial court conducted remand proceedings on an element of ineffective assistance of counsel on which it did not rule and was therefore not reversed. By contrast, the relevant disqualification issue in the present appeal is the meaning of “trial” or “again try the case.” The plaintiff argues that the Supreme Court in Lyme Land I did not order a “new trial” and that the judgment was only partially reversed on the narrow issue of attorney’s fees and the calculation of damages which would not disqualify the trial judge and the Supreme Court is the appropriate court to decide the issue.

Conclusion

The Supreme Court should grant the plaintiff’s Motion to Transfer.

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CERTIFICATION

I hereby certify that the foregoing complies with the formatting requirements set forth in Practice Book § 66-3 and that the font is Arial size 12. I hereby certify that a copy of the foregoing has been provided via e-mail as indicated below on December 11, 2017.

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